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SUPREME COURT

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-1537

M.W. ZACK METAL COMPANY,

Petitioner,

v.

INTERNATIONAL NAVIGATION CORPORATION,

Respondent.

REPLY BRIEF ON PETITION FOR WRIT FOR SUMMARY REVERSAL OR PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

M. W.ZACK METAL COMPANY,

Petitioner,

-against-

INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA,

Respondent.

PETITIONER'S REPLY

On Petition for Writ of Certiori to Court of Appeals, Fourth Circuit.

RESPONDENT'S POINTS IN OPPOSITION TO THIS PETITION ARE UNSOUND AND DO NOT DENY THE GROUNDS ADVANCED FOR THE GRANT OF THE PETITION.

1

The Claim to Mootness

Respondent asserts that this cause of action is moot but without supporting proof for that assertion. Respondent agrees with petitioner's facts that petitioner's claim for cargo damage is $79,723.74 and that the charterer of the vessel was held responsible for only $33,000. and that

the owner of the vessel was let out not on the merits but because of the Statute of Limitations obtaining under German Law. It fails to deny petitioner's claim that the $33,000 was established as the charterer's liability after consideration of the Cogsa limitation of its liability to $500. per package, as the alleged carrier, although there were 93 actual packages shipped. Also, the German court did hold that this respondent as the ship owner would be responsible for ship-board damage to the cargo but as the court dismissed the suit against it for the reason stated it did not bother to explain how the liability for the total cargo damage could be divided or split between what the charterer's liability was and what was the shipowners liability. In other words, respondent would have this court accept the preposterous idea that a recovery of $33,000 as for the charterer's liability suffices to compensate and satisfy a claim of $79,723.74 against the shipowner and charterer on the same voyage. Further-

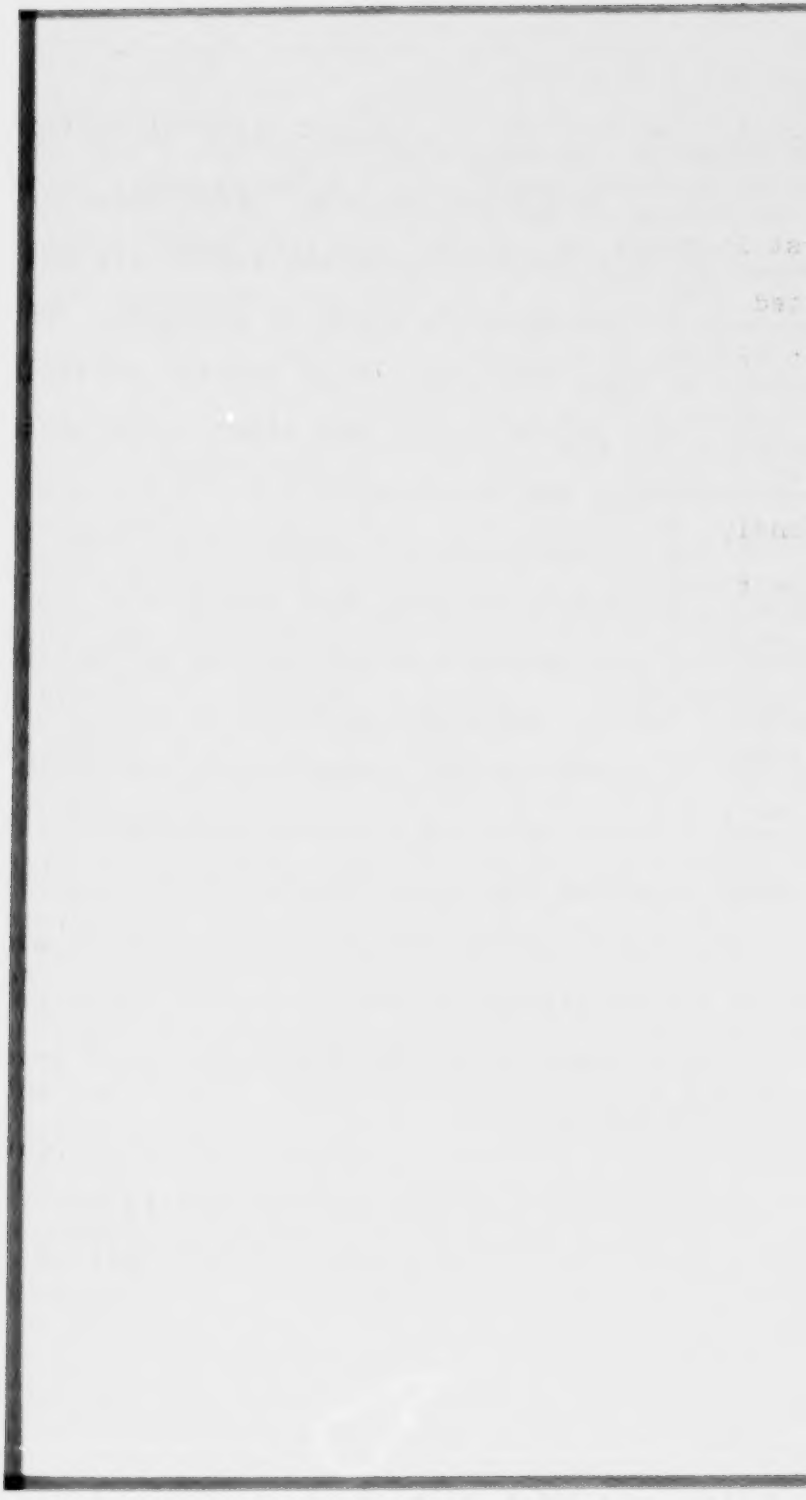
more, the limitation to $33,000 was settled upon by finding that only 66 coils out of the total shipment of 93 coils shipped were damages; whereas the act says, 46 U.S.C.A. 1304 (5), "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount not exceeding $500 per package * * *". Note that the act contemplates a separate limitation for the carrier and the ship. Also that the $500 limitation "per package" is a limitation upon the damages sustained. Petitioner sustained their $79,723.74 loss upon the whole shipment. The whole shipment of 93 coils should have measured the limitation. This court has not yet passed upon the point of construction of that Section of Cogsa. If, therefore, the ship is entitled to the limitation, its limit would be $46,500 which would permit petitioner a full recovery.

Also, respondent is improperly presuming that a judgment is the same thing as payment, so as

to extinguish its own liability. That is far from the actuality of the matter here. This court will understand that the foregoing statements are but an answer to respondent's claim of mootness. The question of what petitioner will recover under the complaint sub judice is for the trial court in the first instance; The Resolute, 168 U.S. 437; and The Adeline, 9 Cranch 244, 3 L. ed. 719. Here this explanation is made to show that petitioner has a substantial continuing interest in the litigation commenced below. So that its claim to this court that the dismissal of the complaint by the Court of Appeals based upon the reversed portion of a judgment rendered the point decided by the court moot, was valid. Here, respondent's claim to mootness is but an attempt to distract this court from petitioner's claim to mootness without valid proof of its invalidity.

II

Next, respondent's effort to prove a



time bar is invalid. First and foremost that is a question to be decided by the trial court in th first instance upon papers and proofs to be submitted. The Court of Appeals has so stated in it last decision. That question goes to the merits the litigation, not to the jurisdiction of the court. Hence, it is of no consideration here. Secondly, the cases cited by respondent (they are to be found at pp. 8 and 9 of its brief) are tota inapposite to the issues to be raised here. They are claimed as authority for a point not decided in them or if decided therein, the fact basis of the decision are different from the facts of this case. For example, Mideast Horticultural Co. Inc v. Pennsylvania R. Co., 320 U.S. 356 is a decisio under the provision of the Interstate Commerce Ac 49 U.S.C.A. 16 (3) (a), not under Cogsa. The Interstate Commerce Act makes the remedy availabl if suit is timely commenced; Cogsa says only that the carrier shall be discharged if suit is not brought in time. The question being whether

the limitation was tolled by the suits commenced by petitioner within the one year period, the discharge promised by Cogsa, 46 U.S.C.A. 1303 (5), does not take affect. This is the import of the cases cited to the Court of Appeals on the rehearing at p. 12 of that petition. They are UNRRA v. Mormacmail, 99 F. Supp. 552,554; Ore S/S Corp. v. Hassel, 137 F. (2) 326, 329; Internatio-Rotterdam Inc. v. Thomsen, 218 F. (2) 514, 516.

Nor are respondents other cases applicable. These concern coastal shipping when the bill of lading clause is said to be applicable; whereas this case is a shipment in foreign commerce to which Cogsa applies exproprio et vigore and hence, such a claim would violate the Cogsa clause prohibiting any lessening of liability, 46 U.S.C.A. 3 (8), and 1305. But, again on issues arising from the contructions of the claims, parties are or should be relegated to the trial court. Here, it is apparent that respondent has not contradicted petitioner's claim that this Honorable

court has jurisdiction, that the Court of Appeals has erred in deciding a question that was moot and has deprived petitioner of its Constitutional rights to have its complaint adjudicated in the Admiralty Courts as provided by Congress. The obviousness of this error ought to appeal to this court to grant the summary reversal requested.

III

At pp. 3-4 respondent admits that Admiralty has personal jurisdiction of the respondent. Yet, it cites Ramsey v. Allegre, 12 Wheat, (25 U.S.) 611, a decision of this court which restated the rule then in effect that Admiralty did not have jurisdiction of suits in personam on debts arising out of contracts. There is no doubt that to-day Admiralty, rather than the Civil Courts, have exclusive jurisdiction of cargo damage suits, even if brought in personam and not against the ship in rem. Respondent even tries to support the decisions below that a suit on a judgment in a cargo damage suit reduces the liability to a count

on a common debt and argues illogically that only judgments in rem may be enforced in our Admiralty courts. Just to state these conflicting propositions exposes their invalidity. The citation to 2 Beale, The Conflict of Laws, p. 1426 does not support the respondent's claim; but section 450.12 on p. 1425, confirms that a dismissal on a local rule of the Statute of Limitations, does not bar a later action on the same cause in another jurisdiction.

For the foregoing reasons, as well as those stated in the petition, summary reversal or the writ of certiori should be granted.

Respectfully submitted,

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